No. 22614

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

APPLE VALLEY BUILDING AND DEVELOPMENT CO., INC.,
Appellant,

vs.

BONANZA AIR LINES, INC.,
Appellee.

APPELLANT'S REPLY BRIEF.

BALL, HUNT, HART AND BROWN,
JOSEPH A. BALL,
STEPHEN A. CIRILLO,
JOSEPH D. MULLENDER, JR.,
120 Linden Avenue,
Long Beach, Calif. 90802,
Attorneys for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

Page

I.

The Apple Valley Affidavits Raise a Substantial Issue of Fact as to Whether There Was an Agreement to Modify the Excess Weight Charge as Contended by Bonanza 1

A. When a Witness Is in a Position to Know Whether or Not an Event Occurred, His Testimony That He Has No Recollection of the Event Is Sufficient to Raise an Issue of Fact 1

B. The Apple Valley Affidavits Deny That There Was an Oral Agreement to Modify the Lease 5

II.

The Evidence Does Not Show a Waiver of the Excess Weight Charge 6

TABLE OF AUTHORITIES CITED

Cases — Page

Asheim v. Pigeon Hole Parking Inc., 283 F. 2d 288 2

Bettelheim v. Hagstrom Food Stores, 113 Cal. App. 2d 873, 249 P. 2d 301 7

Colyear v. Tobriner, 7 Cal. 2d 735, 62 P. 2d 741 ..... 10, 11

Cowell v. Snyder, 15 Cal. App. 634, 115 Pac. 961 9

Eckhart v. Century Fire Insurance Co., 147 Iowa 507, 124 N.W. 170 2

Eiseman v. Pennsylvania R. Co., 151 F. 2d 222 2

Griffith v. San Diego College of Women, 45 Cal. 2d 501, 289 P. 2d 476 ..... 3, 4

H. Herrmann Lumber Co. v. Bjurstron, 74 Misc. Rep. 93, 131 N.Y.S. 689 2

Idaho Mercantile Co. v. Kalanquin, 8 Idaho 101, 66 Pac. 933 ..... 1, 2

Inman's Administratrix v. United Rys. Co. of St. Louis, 157 Mo. App. 171, 137 S.W. 3 2

Julian v. Gold, 214 Cal. 74, 3 P. 2d 1009 7

Knouse v. Nimocks, 8 Cal. 2d 482, 66 P. 2d 438 4

People v. Chambers, 162 Cal. App. 2d 215, 328 P. 2d 236 3

People v. Miller, 134 Cal. App. 2d 792, 286 P. 2d 415 3

People v. One 1949 Ford Tudor Sedan, 115 Cal. App. 2d 157, 251 P. 2d 766 3

People v. Sandoval, 119 Cal. App. 2d 777, 260 P. 2d 153 3

Page

Peterson v. Mountain States Telephone & Telegraph Co., 349 F. 2d 934 2

Port of Palm Beach District v. Goethals, 104 F. 2d 706 3

Railsback v. Patten, 34 Neb. 490, 52 N.W. 277 2

Reid v. Holcomb, 63 Cal. App. 89, 218 Pac. 76 4

Shenson v. Shenson, 124 Cal. App. 2d 747, 269 P. 2d 170 ..... 11, 12

Sinnege v. Oswald, 170 Cal. 55, 148 Pac. 203 8

Taylor v. Taylor, 39 Cal. App. 2d 518, 103 P. 2d 575 8

Title Guarantee and Surety Co. v. Poe, 138 Md. 446, 114 Atl. 41 2

Weingetz v. Cheverton, 102 Cal. App. 2d 67, 226 P 2d 742 3

Rules

Federal Rules of Civil Procedure, Rule 43 2

Statutes

Code of Civil Procedure, Sec. 1963(20) 5

Code of Civil Procedure, Sec. 1963(24) 5

Evidence Code, Sec. 630 9

Evidence Code, Sec. 636 9

No. 22614

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

APPLE VALLEY BUILDING AND DEVELOPMENT CO., INC.,
Appellant,

vs.

BONANZA AIR LINES, INC.,
Appellee.

APPELLANT'S REPLY BRIEF.

I.

The Apple Valley Affidavits Raise a Substantial Issue of Fact as to Whether There Was an Agreement to Modify the Excess Weight Charge as Contended by Bonanza.

A. When a Witness Is in a Position to Know Whether or Not an Event Occurred, His Testimony That He Has No Recollection of the Event Is Sufficient to Raise an Issue of Fact.

The cases cited by Bonanza for the proposition that the statement of a witness to the effect that he has "no recollection" is not sufficient to create a conflict in the evidence are not relevant here or do not support Bonanza's position.

The Idaho, New York, Missouri, Iowa, Maryland and Nebraska cases may be disregarded without reference to whether they hold as Bonanza contends.[1]

---

[1]These cases are cited at pages 13 and 14 of Bonanza's brief, and are as follows: *Idaho Mercantile Co. v. Kalanquin,* (1901)

(This footnote is continued on the next page)

This is a diversity case, and so is governed either by Rule 43 or the case-made law in diversity cases. Rule 43 of the Federal Rules of Civil Procedure favors the admissibility of evidence. The evidence is admissible under either the federal law or the law of the state of the forum, whichever is more liberal. In diversity cases the substantive law of the state of the forum controls. Burden of proof is considered a substantive question. (*Asheim v. Pigeon Hole Parking Inc.,* (9th Cir. 1960) 283 F. 2d 288, 290; *Peterson v. Mountain States Telephone & Telegraph Co.,* (9th Cir. 1965) 349 F. 2d 934, 936). Therefore, under either view the applicable rule is governed either by federal or California law.

The only federal case we have found which is in point is *Eiseman v. Pennsylvania R. Co.,* (3rd Cir. 1945) 151 F. 2d 222. That case holds that testimony of a witness that he does not recall something which he was in a position to see or hear if it did happen, raises a conflict in the evidence as to whether the event occurred. The issue in *Eiseman* was whether a warning bell had been ringing. A witness named Buckson was asked, "You would not know whether the bell was ringing or not? You have no recollection?" He answered, "I have no recollection, and I can't say." The court said:

> "The issue of fact presented by this evidence and Buckson's earlier evidence that if the bell had been rung he 'probably' would have heard it was for the jury."

8 Idaho 101 [66 Pac. 933]; *H. Herrmann Lumber Co. v. Bjurstron,* (1911) 74 Misc. Rep. 93 [131 N.Y.S. 689]; *Inman's Administratrix v. United Rys. Co. of St. Louis,* (1911) 157 Mo. App. 171 [137 S.W. 3]; *Eckhart v. Century Fire Insurance Co.,* (1910) 147 Iowa 507 [124 N.W. 170, 171]; *Title Guarantee and Surety Co. v. Poe,* (1921) 138 Md. 446 [114 Atl. 41]; *Railsback v. Patten,* (1892) 34 Neb. 490 [52 N.W. 277].

The federal case cited by Bonanza (*Port of Palm Beach District v. Goethals,* (5th Cir. 1939) 104 F. 2d 706) is not in point.[2] In that case the issue was whether the corporate seal had been attached to a corporate document. The Corporate Commissioners testified that they did not remember the details. It was admitted that the document was signed. The court did not rule as to whether the failure to remember details was a sufficient denial with respect to the affixing of the seal. It held that the seal was immaterial because the signature was sufficient.

The California law permits a witness to qualify his statement in almost any conceivable manner. The evidence is always admitted and the equivocal nature of it only goes to its weight. See, for example: *People v. One 1949 Ford Tudor Sedan,* (1952) 115 Cal. App. 2d 157, 162 [251 P. 2d 776] ("probably"); *People v. Sandoval,* (1953) 119 Cal. App. 2d 777, 781 [260 P. 2d 153] ("I guess", "I think", "to the best of my recollection"); *People v. Miller,* (1955) 134 Cal. App. 2d 792, 794 [286 P. 2d 415] ("I believe"); *People v. Chambers,* (1958) 162 Cal. App. 2d 215, 218-219 [328 P. 2d 236] ("did not believe"); *Weingetz v. Cheverton,* (1951) 102 Cal. App. 2d 67, 72-73 [226 P. 2d 742] ("I presume").

The only California case we have found involving the term "failure to recall" is *Griffith v. San Diego College of Women,* one of the cases cited by Bonanza.[3] Bonanza cites only the opinion of the District Court of Appeal (280 P. 2d 203). That opinion set aside a

---

[2]Bonanza's Brief, page 13.

[3]Bonanza's Brief, page 13.

judgment affirming an award of arbitration. One of the grounds was that there was a dispute over whether a certain promise had been made by one of the arbitrators. The affidavits denying the promise said that the affiants had no recollection of the promise, and the District Court of Appeal held that this was not a sufficient denial. Thereafter, however, the Supreme Court granted a hearing and affirmed the trial court's judgment. In other words, the opinion of the District Court of Appeal was reversed. (*Griffith v. San Diego College of Women,* (1955) 45 Cal. 2d 501 [289 P. 2d 476].) The opinion of the District Court of Appeal is informative in disclosing the issues involved in the case, but it is not a precedent of any kind because of the granting of the petition for hearing by the Supreme Court. As was said in *Knouse v. Nimocks,* (1937) 8 Cal. 2d 482, 484 [66 P. 2d 438], in connection with the effect of the granting of a petition for hearing:

> "—that opinion and decision are of no more effect as a judgment or as a precedent to be followed in the decision of legal questions that may hereafter arise as if they had not been written."

The only other California case cited by Bonanza is *Reid v. Holcomb,* (1923) 63 Cal. App. 89, 93-94 [218 Pac. 76], and that case is not in point.[4] One of the issues was whether a letter had been delivered to four defendants. The plaintiff's evidence showed that the letter was properly addressed and posted by registered mail, and that a receipt for it had been signed

[4]Bonanza's Brief, page 13.

by the office boy for the four defendants. Three of the four defendants positively denied receiving the letter. The fourth said that he did not remember seeing it. The court held that there was a presumption of delivery under California Code of Civil Procedure §1963, sub. 20 and 24, which are statutory presumptions that the ordinary course of business has been followed, and that a letter duly directed and mailed has been received. The point decided in the case is not whether the fourth defendant's denial was sufficient. The other three positively denied receipt of the letter. The point decided was that delivery to the office boy was proved and not contradicted by the defendants' denials that they themselves did not see the letter.

B. The Apple Valley Affidavits Deny That There Was an Oral Agreement to Modify the Lease.

If it is assumed that the law is as contended by Bonanza, that mere failure to recall an event is not a denial of it, the evidence does not support Bonanza's position. Apple Valley's affidavits do not merely say that the witnesses do not recall the meeting. The Apple Valley affidavits deny that there was any oral agreement to modify the lease.

William Sawyer said:

> "I have no recollection of having attended any meeting on April 22, 1960, in the company of Ralston Hawkins, Louis Arpin, William Barris, nor anyone else." [Clk. Tr. p. 223, lines 16-20].

Let us assume that this is not a sufficient denial that there was a meeting on April 22, 1960, and that there

may have been a meeting. The important thing is whether there was any discussion of the excess weight landing fee. As to this Sawyer is positive that there never was any such discussion. He said:

> "I did not ever discuss the excess weight landing fee provision of the Apply Valley Airport Lease with Bonanza representatives." [Clk. Tr. p. 223, lines 12-14].

William Barris was similarly positive as to their being no conversation of the type claimed by Bonanza. Barris, like Sawyer, said he did not recall any meeting, but he added that:

> "I did not have anything whatever to do with the negotiations of lease terms for the Apple Valley Airport before January 26, 1965." [Clk. Tr. p. 213, lines 21-23].

Each of these affidavits raises a substantial issue of fact. Bonanza claims that Sawyer and Barris agreed to a reduction of the excess weight charge. Sawyer said that he never discussed the excess weight charge. Barris said he had nothing to do with lease negotiations prior to 1965.

II.

The Evidence Does Not Show a Waiver of the Excess Weight Charge

Bonanza apparently claims that Apple Valley's acceptance of rent without claiming the excess weight charge is a waiver as a matter of law. The cases cited by Bonanza do not support such a contention. Waiver or estoppel in some cases may be inferred from failure to assert a right, but this inference cannot be drawn

as a matter of law from this fact alone on a motion for summary judgment.[5] None of the cases cited by Bonanza holds that there is a waiver or estoppel as a matter of law on such evidence.

In *Bettelheim v. Hagstrom Food Stores,* (1952) 113 Cal. App. 2d 873, 878 [249 P. 2d 301],[6] the court affirmed a judgment after trial where estoppel had been found by the trial court. But the necessity to try the issue was clearly recognized, and it was expressly held that the trial court could have found there was no estoppel. The court said:

> "While a contrary conclusion might have been drawn, such a conclusion is not inevitable or the only reasonable one. In such event we are bound by the conclusion drawn by the trial court."

In *Julian v. Gold,* (1931) 214 Cal. 74 [3 P. 2d 1009],[7] the trial court found that a lessor and lessee orally agreed to reduce the rent, and that the lessor accepted the lower amount according to the oral agreement, but held that the lessor was still entitled to recover the rent specified in the lease because the agreement was not in writing and not supported by consideration. The judgment was reversed because the oral agreement had been executed and was therefore valid. In the case now under consideration there is an issue of fact as to whether there was an oral agreement, and Bonanza's rent payments, as well as its contention

---

[5]In our opening brief it was shown that there is evidence explaining the failure to claim the charge earlier (Appellant's Op. Br. pp. 11-13); and that even Bonanza's evidence is subject to the construction that there was no waiver (Appellant's Op. Br. pp. 18-21).

[6]Bonanza's Brief, page 16.

[7]Bonanza's Brief, page 18.

of waiver, are not in accord with its claim of an oral agreement. Bonanza claims there was an oral agreement to reduce the excess weight charge. It does not claim there was an agreement to waive it entirely. Bonanza did not pay or tender even the reduced amount which it claims was agreed to.

Sinnege v. Oswald, (1915) 170 Cal. 55 [148 Pac. 203][8] is authority against Bonanza's position. A lease provided for rent in the amount of $347 per month. For a period of time the lessee paid and the lessor accepted $317 per month. There was no dispute about these payments that were accepted. The lessor then sued for two payments of $347 which had not been paid at all, and by supplemental complaint for a third payment of $347. The lessee contended (as Bonanza does here) that the rental rate had been reduced by the prior acceptance of lower payments. The trial court gave judgment for the full amount claimed, namely, three months at $347 per month. The Supreme Court affirmed, but reduced the judgment by one-half month's rent to a total of $867.50, pursuant to a stipulation to do so because the tenant had moved out during the third month.

Taylor v. Taylor, (1940) 39 Cal. App. 2d 518 [103 P. 2d 575],[9] also does not support Bonanza's position. In that case a property settlement agreement provided that the husband would advance $100 per month to the wife, and that he would account to her for one-half of the income from certain real property, less the $100 advanced. Over a period of years the husband ad-

---

[8]Bonanza's Brief, page 18.

[9]Bonanza's Brief, page 18.

vanced various amounts to the wife which were sometimes less than $100 per month, and various accounts were settled regarding the income. The wife then sued claiming that $4,173.81 was due if the husband had properly accounted for income. The trial court found that nothing was due, and that the parties had modified the agreement by their conduct. The Court of Appeals affirmed only insofar as denying recovery of the amounts which had been settled by the prior accountings, but reversed the finding that the agreement had been modified. Bonanza's claim is far different. Bonanza's claim is that there was an oral agreement to reduce the excess weight charge, not that there was any agreement to waive it entirely. The alleged agreement is disputed, but regardless of that, Bonanza did not tender or pay or acount in any manner for any portion of the excess weight charge.

California Evidence Code §636[10] provides that "The payment of earlier rent or installments is presumed from a receipt for later rent or installments." Assuming that this code section is applicable at all (Bonanza made no later or any other excess weight charge payments), it could only raise a rebuttable presumption (Evidence Code § 630). The presumption is rebutted, not only by Apple Valley's evidence, but by Bonanza's admission that the charge has never been paid.

In *Cowell v. Snyder,* (1911) 15 Cal. App. 634 [115 Pac. 961][11] the landlord notified the tenant, at the end of the term of the lease, that he would claim a higher rental if the tenant held over. The tenant notified

[10]Bonanza's Brief, page 18.
[11]Bonanza's Brief, page 18.

the landlord that he would not pay the higher rental, and the landlord accepted rent at the rate specified in the lease. The trial court found that under these circumstances the lease had not been modified, and this portion of the judgment was affirmed. In our case there is an issue of fact as to whether Bonanza notified Apple Valley that it would pay the excess weight charge at a lower rate, and even if after trial a finding were made according to Bonanza's testimony, Apple Valley would be entitled to the excess weight charge at the lower rate.

In *Colyear v. Tobriner,* (1936) 7 Cal. 2d 735 [62 P. 2d 741],[12] there was a written one-year lease providing for rent at the rate of $45 per month, with an option to renew prior to expiration of the term at "a monthly rental not to exceed a 20% increase of the present rental basis." Prior to expiration of the term, the tenant purported to exercise the option, but agreed only to pay $45 per month. A 20% increase would amount to $54 per month. The landlord refused to accept the exercise of the option on these terms, but permitted the tenant to remain in possession and accepted $45 per month for a period of time. Then the landlord notified the tenant that the tenancy was terminated, and that he would demand $750 per month if the tenant remained in possession. The trial court held that the option was not properly exercised, and gave judgment for $750 per month for the period of possession after the landlord's notice to pay that amount.

---

[12]Bonanza's Brief, page 18.

The judgment was affirmed insofar as it found that the option was not exercised, but reversed for retrial on the amount of rent to be paid after the notice to pay $750 per month. The court held that since the option was not exercised, the tenant continued at sufffrance and was liable for the reasonable rental value.

The *Colyear* case is distinguishable, not only because it is a disputed issue of fact in our case as to whether notice was given or any agreement was made, but for the more fundamental reason that it involved the situation of a dispute as to the amount of rent after expiration of the term. Bonanza's sole contention is that there was an agreement to modify the lease prior to expiration of the term. If Apple Valley agreed to Bonanza's proposal to accept a lesser weight charge, the lease would be so modified. If Bonanza merely notifed Apple Valley that it wanted to pay a lesser weight charge and Apple Valley did not agree (and that is really all that Bonanza's evidence shows at best) the lease would not be modified. In either event, upon expiration of the term, Apple Valley would be entitled to the rent provided in the lease because Bonanza held over with Apple Valley's consent. The rule to be applied in this situation is found in *Shenson v. Shenson,* (1954) 124 Cal. App. 2d 747, 753 [269 P. 2d 170]. The rule is that if the tenant holds over without consent of the landlord, he is liable for reasonable rental. That is the case of *Colyear v. Tobriner.* But if the holding over is with consent, it is presumed that the

tenancy resulting from the holding over is on the same terms as the original lease. That is the case of *Shenson v. Shenson,* and is the rule which governs here. The sole question here is whether there was a modification of the lease. Whatever the finding is on that issue, the legal rights and liabilities of the parties follow as a matter of law. Apple Valley is entitled to the excess weight charge, either as written in the lease or in a lesser agreed amount if there was an agreement.

Respectfully submitted,

BALL, HUNT, HART AND BROWN,
JOSEPH A. BALL,
STEPHEN A. CIRILLO,
JOSEPH D. MULLENDER, JR.,
Attorneys for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOSEPH D. MULLENDER, JR.